Office-Supreme Court, U.S.
FILED
FEB 28 1966
JOHN F. DAVIS, CLERK

No. 932

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

LEONARD S. GOODMAN and BARBARA L. GOODMAN,
Petitioners,

v.

CHARLES J. FUTROVSKY, Plaintiff-Appellee Below, and N. M. COHEN, EMANUEL COHEN, JACOB LEHRMAN, ISRAEL COHEN, GIANT FOOD, INC., CHARLOTTE FERSON LEHRMAN, JOSEPH B. DANZANSKY; and ISRAEL COHEN, EMANUEL COHEN, and LILLIAN C. SOLOMON, doing business as MAX SHAPIRO, Defendants-Appellees Below, *Respondents.*

REPLY TO THE BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

LEONARD S. GOODMAN,
Attorney for Petitioners,
7119 Sixteenth Street, N.W.
Washington, D. C. 20012.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 932

LEONARD S. GOODMAN and BARBARA L. GOODMAN,
Petitioners,

v.

CHARLES J. FUTROVSKY, Plaintiff-Appellee Below, and N. M. COHEN, EMANUEL COHEN, JACOB LEHRMAN, ISRAEL COHEN, GIANT FOOD, INC., CHARLOTTE FERSON LEHRMAN, JOSEPH B. DANZANSKY; and ISRAEL COHEN, EMANUEL COHEN, and LILLIAN C. SOLOMON, doing business as MAX SHAPIRO, Defendants-Appellees Below, *Respondents.*

REPLY TO THE BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Appellees argue that the Chancery Court only exercised an equitable discretion to approve their settlement and the Delaware Supreme Court but decided whether the Chancery Court had abused its discretion. With this they seek to establish a non-federal ground for the decision below and to avoid the merits.

Futrovsky, purporting to represent all stockholders of Giant, agreed to a settlement in the Chancery Court

on the assumption that all stockholders had consented to the arrangement between Giant and Shapiro, and that he could only hope to hold the officers and directors of Giant to a "reasonable" profit from the arrangement. As the Delaware court noted, "In the light of this conclusion the settlement agreement was negotiated" (Petition, p. 5a). All the present appellees premised this conclusion exclusively on the ground that the Securities Act of 1933 required the delivery of a prospectus to all prospective buyers of stock in 1959, and hence each of the original stockholders bought with knowledge of the Giant-Shapiro arrangement. (Petition, pp. 1a-2a). The Chancery Court held that the entire cause of action set forth in Futrovsky's complaint "could not, in all probability, withstand the defense of estoppel." (*id.* at 3a). Since the Chancery Court took no evidence showing an estoppel, its ruling necessarily involved the acceptance of appellees' interpretation of the Securities Act. It, therefore, rested its decision on federal grounds.

Whether or not the Chancery Court expressly ruled on the effect of the Securities Act, the matter was presented for its decision and was necessary to its approval of the settlement before it, thereby raising a federal question.[1] An interpretation of the Securities Act was necessary to its decision for the reason it is well-settled in Delaware that, if approval or disapproval of a proposed settlement turns on the construction of a statute, the Chancery Court will make the necessary construction in addition to determining the overall "fairness" of the settlement, as the cases relied

---

[1] *Bell's Gap R. Co.* v. *Pennsylvania,* 134 U.S. 232, 236; *Erie R. Co.* v. *Purdy,* 185 U.S. 148, 154.

upon by appellees show.[2] The Chancery Court is required "to consider and weigh the claims and possible defenses" before approving a settlement. *Saminsky* v. *Abbott,* 194 A. 2d 549, 551 (Del. Ch. Ct. 1963), aff'd *sub nom. Kleinman* v. *Saminsky,* 200 A. 2d 572 (Del. S. Ct. 1964), *cert. denied,* 379 U.S. 900, where the Chancery Court construed the Investment Company Act of 1940 (at 551) before reaching the reasonableness and fairness of the settlement (at 551-53). And see *Manacher* v. *Reynolds,* 165 A. 2d 741 (Del. Ch. Ct. 1960), where the Chancery Court also first construed the Investment Company Act (at 746-47) before reaching any issue of the "fairness" of the settlement (at 748).[3]

---

[2] On the other hand there are important distinctions between some of the cases cited by appellees and the present case. Appellees' cases for the most part involve a stockholder's attack upon the business judgment of an independent board of directors, unlike the present case where the officers and directors are interested appellees. The Delaware courts will normally defer to the judgment of disinterested directors without further inquiry. *Perrine* v. *Pennroad Corp.,* 47 A. 2d 479, 487-88 (Del. S. Ct. 1946); *Krinsky* v. *Helfand,* 156 A. 2d 90, 94 (Del. S. Ct. 1959); *Hoffman* v. *Dann,* 205 A. 2d 343, 350 (Del. S. Ct. 1964), *cert. denied,* 380 U.S. 973. The case of *General Foods Corp.* v. *Cryo-Maid, Inc.,* 198 A. 2d 681 (Del. S. Ct. 1964), heavily relied on by appellees, involved only an "appeal from an interlocutory order granting a stay and settling no substantive legal rights." (at 682).

[3] *Dann* v. *Chrysler Corp.,* 198 A. 2d 185, 196 (Del. Ch. Ct. 1963), aff'd *sub nom. Hoffman* v. *Dann, supra,* involved the legal effect of corporate bylaws in addition to the fairness of a settlement. Later in awarding fees the Chancery Court stated in a dictum quoted by appellees (Opposition Brief, p. 8), that it had not determined the claims as in ordinary litigation. In the very next sentence, however, which was not quoted by appellees, the Court added that, "Nevertheless, where, as here, the merits of the claims are not admitted, the plaintiffs have the burden of showing that they filed meritorious claims." (215 A. 2d 709, 713).

What was implicit in the decision of the Chancery Court was made explicit by the Delaware Supreme Court. The latter expressly ruled that the Securities Act "required as a practical matter that the 1959 purchasers of Giant stock be furnished with a copy of the Prospectus," and having made their purchases "with full knowledge" of the Giant-Shapiro arrangement, the stockholders "could not, therefore, successfully complain" of the arrangement. The present petitioners, the court added, "are bound by the acquiescence, with full knowledge, of their predecessors and are now precluded from attacking the Giant-Shapiro relationship." The settlement was thereupon considered only "upon the alternate theory of recovery." (Petition, p. 10a).

It may be that the Delaware Supreme Court could have decided this case upon broad equitable grounds, and not have construed the Securities Act. It chose not to; and having chosen to decide a federal question, the Delaware Court may not now be said to have rested on a non-federal ground. *Steele* v. *L. & N. R. Co.*, 323 U.S. 192, 197 note 1; *Indiana ex rel. Anderson* v. *Brand*, 303 U.S. 95, 98.

Moreover, it is clear that the Delaware Supreme Court would not have countenanced legal error by the Chancery Court under any view of its appellate jurisdiction. The review of an exercise of discretion in Delaware involves the determination of whether the lower court, "in view of the relevant rules of law and upon due consideration of the facts of the case could reasonably have reached the conclusion of which complaint is made." *In re Public Service Holding Corporation*, 24 A. 2d 584, 587 (Del. S. Ct. 1942). "Where, however, the [lower] court in reaching its conclusion

overrides or misapplies the law . . . an appellate court will not hesitate to reverse." *Pitts* v. *White,* 109 A. 2d 786, 788 (Del. S. Ct. 1954).

The decision of the Delaware Supreme Court raises a federal question, even if we view it as expressly deciding no issue of federal law. In its consideration of the claims and defenses, it erroneously considered the effect of the Securities Act as precluding all relief, except that which had been negotiated. On petition for certiorari the jurisdictional question is whether "the same judgment would be rendered by the state court after we corrected its views of federal laws." *Herb* v. *Pitcairn,* 324 U.S. 117, 126. The Delaware Supreme Court tells us that the buying public would have a cause of action, and could seek an end to the Giant-Shapiro relationship, if it had been "misled to its injury" by the initial sale of stock in 1959. (Petition, p. 9a). The sole ground for deciding that the buying public had not been misled to its injury was the court's reading of the Securities Act. The federal ground of the decision controlled the judgment. Contrast *Enterprise Irrig. Dist.* v. *Canal Co.,* 243 U.S. 157, 164, where Constitutional and independent equitable grounds of estoppel do appear.

We urgently renew our petition that this Court give plenary consideration to the important question of federal law decided below. Appellees have not contested in their Opposition Brief the showing of the Petition that the Securities Act authorizes delivery of a prospectus after stock purchases have occurred, and that delivery will often, if not normally, take place in this fashion. The decision below is manifestly wrong.

Prior to the decision of the Delaware court it seemed "safe to assume that, absent any conflict with federal law, whatever common law or statutory remedies may otherwise exist are not affected by any of the SEC statutes." 1 Loss, *Securities Regulation*, 156 (2d ed. 1961). The Delaware court improperly construes the 1933 Act not only to cut off preexisting common law remedies, but with an effect contrary to the interests of public investors and only to shield corporate officers and directors.

We may particularize and further show the devastating effects of the decision below on the interests of innocent investors. It was not contested below that petitioners bought their shares on the American Stock Exchange without notice of this litigation or of any of the matters and things involved in the litigation.[4] Petitioners were bona fide purchasers for value of their Giant stock. But they are now held to the notice allegedly given to their predecessors in interest, not upon any proof that such notice was given, but solely upon an erroneous interpretation that the Securities Act required their predecessors to receive a prospectus containing the requisite notice before they bought their shares.

Congress never intended that the Securities Act be used to cut off the common law rights of investors buying new public shares, and much less the rights of subsequent bona fide purchasers. Moreover, if bona fide purchasers are to be estopped from complaining of matters disclosed in a prospectus allegedly given to

---

[4] See petitioners' "Notice of Intention to Appear, Position to be Asserted and Grounds for Position To Be Asserted," filed in the Chancery Court, and also reproduced in the Appendix to the Brief of Appellants in the Delaware Supreme Court, p. A-72.

their predecessors, the lower court should not be permitted by a construction of federal law to encourage the smallest distribution of the prospectus prior to effective stock sales.

The construction of the Securities Act below is not designed to protect innocent investors, but rather to destroy their rights as public investors and bona fide purchasers. The ruling is at such wide variance from the holding of this Court in *Frost & Co.* v. *Mines Corp.*, 312 U.S. 38, as to require reversal by this Court.

Respectfully submitted,

LEONARD S. GOODMAN,
Attorney for Petitioners,
7119 Sixteenth Street, N.W.
Washington, D. C. 20012.